SINGAPORE REPORTS

Chng Suan Tze v The Minister of Home Affairs & Ors and other appeals

COURT OF APPEAL (SINGAPORE) – CIVIL APPEAL NOS 63, 64, 65 AND 81 OF 1988
WEE CHONG JIN CJ, THEAN AND CHAN SEK KEONG JJ
8 DECEMBER 1988

Constitutional Law – Habeas corpus – Detention under Internal Security Act – Burden on executive when detention challenged – Necessity to prove satisfaction of President – Evidence of President's satisfaction – Evidence of Minister or Secretary to Cabinet – Satisfaction of President and Minister reviewable by court of law – Objective test applicable – Court can examine whether matters relied on by executive fall within scope of specified purposes – Precedent fact principle of review not applicable to discretions under Internal Security Act – Scope of review of discretions limited to illegality, irrationality or precedural impropriety – Burden on applicant who challenges the satisfaction of President or Minister on those grounds – Principle of proportionality not separate ground – Suspension direction can be revoked to make detention order operative again – Conditions of detention – Internal Security Act (Cap 143, 1985 Ed), ss 8(1) & 10 – Constitution of the Republic of Singapore, arts 9, 12(1) & 21(1)

Preventive Detention – Detention under Internal Security Act – Burden on executive when detention challenged – Necessity to prove satisfaction of President – Evidence of President's satisfaction – Evidence of Minister or Secretary to Cabinet – Satisfaction of President and Minister reviewable by court of law – Objective test applicable – Court can examine whether matters relied on by executive fall within scope of specified purposes – Precedent fact principle of review not applicable to discretions under Internal Security Act – Scope of review of discretions limited to illegality, irrationality or precedural impropriety – Burden on applicant who challenges the satisfaction of President or Minister on those grounds – Principle of proportionality not separate ground – Suspension direction can be revoked to make detention order operative again – Conditions of detention – Internal Security Act (Cap 143, 1985 Ed), ss 8(1) & 10 – Constitution of the Republic of Singapore, arts 9, 12(1) & 21(1)

Administrative Law – Judicial review – Detention under Internal Security Act – Burden on executive when detention challenged – Necessity to prove satisfaction of President – Evidence of President's satisfaction – Evidence of Minister or Secretary to Cabinet – Satisfaction of President and Minister reviewable by court of law – Objective test applicable – Court can examine whether matters relied on by executive fall within scope of specified purposes – Precedent fact principle of review not applicable to discretions under Internal Security Act – Scope of review of discretions limited to illegality, irrationality or procedural impropriety – Burden on applicant who challenges the satisfaction of President or Minister on those grounds – Principle of proportionality not separate ground – Internal Security Act (Cap 143, 1985 Ed), ss 8(1) & 10

Civil Procedure – Binding precedent – Whether decision of Federal Court of Malaysia binding in Singapore

In this case Teo Soh Lung ('Teo'), Kevin de Souza ('de Souza') and Wong Souk Yee ('Wong') were arrested with others on 21 May 1987 for being involved in a marxist conspiracy to subvert and destabilize the country to establish a Marxist state. On 19 June 1987, the Minister of Home Affairs made detention orders pursuant to s 8(1)(a) of the Internal Security Act (Cap 143, 1955 Ed) directing that Teo, de Souza and Wong be detained for one year with effect from 20 June 1987.

Chng Suan Tze was arrested on 20 June 1987 and she was subsequently served with the Minister's detention order on 18 July 1987 providing for her detention for one year with effect from 19 July 1987.

Subsequently all the four appellants were served with statements pertaining to the grounds and allegations of facts on which their detention orders were based. The appellants, other than Wong, made written representations to the advisory board. The advisory board did not recommend the release of any of the appellants and the appellants continued to be detained.

On 26 September 1987, the Minister, in exercise of the powers conferred on him by s 10 of the Internal Security Act, directed that the operation of the detention orders in respect of all the applicants be suspended subject to certain conditions. Subsequently, however, after the appellants had made a joint press statement the Minister made revocation orders pursuant to s 10 of the Internal Security Act, revoking the suspension directions and re-arresting the appellants. On 18 June 1988, Teo was served with a direction extending her detention for one year with effect from 10 June 1988. The remaining appellants were served with extension orders when their initial one-year detention period expired.

The appellants applied for leave to issue writs of habeas corpus. These were dismissed by the High Court (see [1988] 2 MLJ 493 and [1988] 3 MLJ 241) and the appellants appealed. The following legal issues were raised by the appellants:

(a) it was contended that as the detention orders which the Minister made under s 8(1) of the Internal Security Act depend on the President being satisfied that it is necessary to do so for one of the purposes specified therein, the burden is on the respondents to produce evidence of the President's satisfaction;

(b) it was submitted that the exercise of the discretionary power under ss 8 and 10 of the Internal Security Act is subject to the objective test and thus reviewable by a court of law and that to discharge this burden the executive has to satisfy the court that there are objective facts in existence which justify the executive's decision;

(c) it was contended that as s 10 of the Internal Security Act does not give any power to re-arrest and re-detain following the making of the revocation order, the re-detention in their cases was therefore unlawful;

(d) it was contended that Teo's detention, even if originally lawful, had been rendered unlawful by the conditions of her detention.

Held, allowing the appeals:

(1) Where detention under s 8 of the Internal Security Act ('the Act') is challenged, the initial burden is on the executive to justify the legality of the detention; this burden is discharged by the production of the detention order and evidence that the President, acting in accordance with advice of Cabinet or the authorized Minister, was satisfied as required by s 8(1) of the Act.

(2) It is for the executive to prove that the President is satisfied as under s 8(1) of the Act, the President's satisfaction precedes the Minister's powers to make the detention order.

(3) Evidence of the President's satisfaction must be such evidence as would be admissible at a trial; neither the recital in the detention order nor an affidavit by the Permanent Secretary, Ministry of Home Affairs is sufficient.

(4) In the absence of direct evidence from the President of his satisfaction, the court would presume that the President has been satisfied where there is evidence that Cabinet or the authorized Minister was satisfied and that the President after receiving the advice of Cabinet or the authorized Minister was satisfied; such evidence must come from any Cabinet Minister or the Secretary to the Cabinet where it was the Cabinet that was involved, and from the authorized Minister if it was the authorized Minister who was involved.

(5) In the present appeals, the respondents have not discharged their burden of proving that the President was satisfied as required by s 8(1) of the Act before the Minister made the detention orders. These appeals must therefore be allowed on this ground.

(6) The President's satisfaction under s 8 of the Act and the Minister's satisfaction under s 10 are both reviewable by a court of law as:

(a) the subjective test adopted in *Karam Singh* v *Menteri Hal Ehwal Dalam Negeri, Malaysia*[4] and its progeny can no longer be supported and the objective test is applicable upon a judicial review of the exercise of these discretions; and

(b) although a court will not question the executive's decision as to what national security requires, the court can examine whether the executive's decision was in fact based on national security considerations; similarly, although the court will not question whether detention was necesary for the purpose specified in s 8(1), the court can examine whether the matters relied on by the executive fall within the scope of those specified purposes;

(7) The scope of review of the discretions under ss 8(1) and 10 of the Act, however, depends on whether these discretions fall within the 'precedent fact category' so that the 'precedent fact principle of review' is applicable.

(8) Where the 'precedent fact principle of review' applies, the court's function is, first, to determine whether the precedent fact has been established by the decision-maker to exist on a balance of probabilities and, secondly, where such fact is established, to review the decision that is challenged on *GCHQ*[27] grounds.

(9) Whether the discretions fall within the 'precedent fact category' depends on a construction of the relevant provisions, the question being whether Parliament has made clear its intention to take the discretions out of the precedent fact category.

(10) It is clear that the discretions under ss 8(1) and 10 of the Act have been entrusted to the executive, thereby taking these discretions out of the precedent fact category; there are no jurisdictional or precedent facts which precede these discretions.

(11) In the circumstances, the scope of review of these discretions is limited to the *GCHQ*[27] grounds of illegality, irrationality or procedural impropriety.

(12) The burden of proving that the President's or the Minister's satisfaction is illegal, irrational or procedurally improper lies on the applicant who challenges such satisfaction on these grounds.

(13) The principle of proportionality has not been established as a separate ground for review in addition to those mentioned in (11) above.

(14) A suspension direction under s 10 of the Act merely suspends the operation of the detention order. Once the suspension direction is revoked, the detention order becomes operative again. The power to arrest and detain is conferred by the detention order itself. No express provision is required.

(15) As a general rule, therefore, where the manner in which detention is conducted is alleged to be unlawful whether because the conditions are alleged to be punitive in nature or excessively harsh, the detainee's remedy is to challenge the validity of the conditions of the detention, not the lawfulness of the detention itself.

Cases referred to

1 *Lee Mau Seng* v *Minister of Home Affairs, Singapore* [1971] 2 MLJ 137 (refd)
2 *Liversidge* v *Anderson* [1942] AC 206 (not folld)
3 *Greene* v *Secretary of State for Home Affairs* [1942] AC 284 (not folld)
4 *Karam Singh* v *Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129 (not folld)
5 *Kevin Desmond de Souza & Ors* v *The Minister of Home Affairs & Ors* [1988] 2 MLJ 493 (refd)
6 *Yeap Hock Seng* v *Menteri Hal Ehwal Dalam Negeri, Malaysia* [1975] 2 MLJ 279 (refd)
7 *Athappen a/l Arumugam* v *Menteri Hal Ehwal Dalam Negeri, Malaysia* [1984] 1 MLJ 67 (refd)
8 *Re Tan Sri Raja Khalid bin Raja Harun* [1988] 1 MLJ 182 (refd)
9 *Theresa Lim Chin Chin* v *Inspector-General of Police* [1988] 1 MLJ 293 (refd)
10 *Karpal Singh* v *Menteri Hal Ehwal Dalam Negeri, Malaysia* [1988] 1 MLJ 468 (refd)
11 *Re Wong Mann Tung* [1988] 1 MLJ 286 (refd)
12 *Nakkuda Ali* v *Jayaratne* [1951] AC 66 (folld)
13 *Ex parte Rossminster* [1980] AC 952 (folld)
14 *Khawaja* v *Home Secretary* [1984] AC 74 (folld)
15 *Lau Seng Poh* v *Controller of Immigration* [1985] 2 MLJ 350 (refd)
16 *Minister of Home Affairs* v *Austin* (1987) LRC (Const) 567 (folld)
17 *Katofa* v *Administrator-General for SW Africa* [1985]4 SA 211 (SWA) (folld)
18 *Attorney General of St Christopher, Nevis and Anguilla* v *Reynolds* [1980] AC 637 (folld)
19 *Secretary of State for Education and Science* v *Tameside Metropolitan Borough Council* [1977] AC 1014 (refd)
20 *Liew Sai Wah* v *PP* [1969]1 AC 295; [1968] 2 MLJ 1 (refd)
21 *Ong Ah Chuan* v *PP* [1981] AC 648; [1981] 1 MLJ 64 (refd)
22 *Teh Cheng Poh* v *PP* [1980] AC 458 (refd)
23 *Liyanage* v *The Queen* [1967] 1 AC 259 (refd)
24 *Padfield* v *Minister of Agriculture, Fisheries and Food & Ors* [1968] AC 997 (refd)
25 *R* v *IRC, ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 (refd)
26 *The Zamora* [1916] 2 AC 77 (refd)
27 *CCSU* v *Minister for the Civil Service* (the *GCHQ* case) [1985] AC 374 (refd)
28 *R* v *Secretary of State for the Home Department, ex parte Ruddock* [1987] 1 WLR 1482 (refd)
29 *Young* v *Bristol Aeroplane Co Ltd* [1944] KB 718 (refd)
30 *Ex parte Zamir* [1980] AC 930 (refd)

31 *Associated Provincial Picture Houses Ltd* v *Wednesbury Corporation* [1948]1 KB 223 (refd)
32 *R* v *Secretary of State for Home Department, ex parte Benwell* [1984] 3 WLR 843 (refd)
33 *Wheeler* v *Leicester City Council* [1985] AC 1054 (refd)
34 *R* v *Ealing LBC, ex parte Times Newspapers Ltd* (1987) 85 LGR 316 (refd)
35 *Magor and St Mellons* v *Newport Corporation* [1952] AC 189 (refd)
36 *Middleweek* v *Chief Constable of Merseyside* The Times 1 August 1985; (1985) The Times LR 489 (refd)
37 *Re Al-Afifi's Application for Habeas Corpus* Lexis (refd)

Legislation referred to

Constitution of the Republic of Singapore arts 9, 12(1), 13, 14, 21(1)
Internal Security Act (Cap 143, 1985 Ed) ss 8(1), 10, 11(1), 11(2)
Interpretation Act (Cap 1, 1985 Ed) s 34
Republic of Singapore Independence Act s 13(1)
Habeas Corpus Act 1816 [UK] s 3

Appeal from: Originating Motion Nos 53 of 1988, 54 of 1988, 55 of 1988 and 46 of 1988 (High Court, Singapore)

Anthony Paul Lester QC (*Ms Roslina Baba* with him) for the appellant in CA No 81 of 1988.
Geoffrey Ronald Robertson QC (*George Lim* with him) for the appellant in CA No 64 of 1988.
Geoffrey Ronald Robertson QC (*Rajan Nair* with him) for the appellant in CA No 65 of 1988.
Geoffrey Ronald Robertson QC (*Peter Low* with him) for the appellant in CA No 63 of 1988.
S Tiwari, Soh Tze Bian and *Ms Joyce Huen* for the respondent.

Cur Adv Vult

Wee Chong Jin CJ (delivering the judgment of the court): These appeals arise from the High Court's dismissal of the four appellants' applications for leave to issue writs of habeas corpus. The respondents in each case are the same. The habeas corpus application by the appellant Teo Soh Lung was made on 22 April 1988. The applications by the other three appellants were made on 27 April 1988. The High Court heard the applications by Chng Suan Tze ('Chng'), Kevin de Souza ('de Souza') and Wong Souk Yee ('Wong') together; Teo Soh Lung's ('Teo') application was heard separately by the same judge. The appeals were argued before us in similar fashion but Teo's appeal was argued first over four days from 19-22 September 1988; the other three appeals took two days on 24 and 25 October 1988. Extensive arguments were raised before us in all these appeals, and for reasons which will soon become apparent, we have decided to give our decisions in all four appeals in a single judgment.

The facts

Teo, de Souza and Wong had been arrested together with 13 others on 21 May 1987 during a security operation launched by the Internal Security Department ('ISD') of the government, pursuant to s 74(1) of the Internal Security Act (Cap 143, 1985 Ed) ('ISA'), for being involved in a marxist conspiracy to subvert and destabilize the country to establish a marxist state. It appears from a press statement in an affidavit filed in these proceedings that one of those arrested, Vincent Cheng, who is also alleged to be a central figure in this conspiracy, subsequently said on television that he was setting up a marxist network and systematically infiltrating religious and other bodies and building up pressure groups for confrontation with the government. According to him, this would start with peaceful protests, escalating to mass events, 'leading to public disorder and maybe even rioting, bloodshed and violence'. On 19 June 1987, the Minister of Home Affairs ('the Minister') made detention orders pursuant to s 8(1)(a) of the ISA directing that Teo, de Souza and Wong be detained for one year with effect from 20 June 1987.

Chng, on the other hand, was first arrested on 20 June 1987. She was subsequently served with the Minister's detention order made under s 8(1) of the ISA on 18 July 1987 providing for her detention for one year with effect from 19 July 1987. Pursuant to s 11(2)(b) of the ISA, all four appellants were served with statements pertaining to the grounds and allegations of fact on which their detention orders were based.

In Teo's case, the statement stated as follows:

Grounds on which a detention order is made

Between 1984 and May 1987, you acted in a manner prejudicial to the security of Singapore by being involved in a marxist conspiracy to subvert the existing social and political system in Singapore, using communist united front tactics, with a view to establishing a marxist state.

Allegations of fact

(1) That you facilitated the infiltration of the Workers' Party in 1984 by a group of marxists after discussions with Paul Lim Huat Chye, Tan Wah Piow's fellow marxist, and other activists. You also actively assisted them in their efforts to make use of the Workers' Party as a vehicle to further the marxist cause.
(2) That you and Tang Fong Har made use of the Law Society of Singapore as a political pressure group at the suggestion of Paul Lim Huat Chye.

On 15 August 1987, pursuant to s 11(1) of the ISA, Teo submitted written representations to the advisory board. In her representations, she protested her innocence, denied any complicity in the marxist plot, denied that she was a marxist or a member of the Communist Party of Malaya and claimed that she was legitimately exercising her civil and political rights. She also expressed her belief that her arrest and detention '(might) be intended to prevent (her) from participating in politics'. As for her links with Tan Wah Piow and Paul Lim, who are also alleged to be key figures in the marxist conspiracy, the appellant claimed that she did not know Tan Wah Piow

personally or that he is a marxist or communist, and that she did not know if Paul Lim is a marxist. Tan Wah Piow, a former radical student activist, is alleged by the government to be the mastermind of the marxist plot with Paul Lim as his emissary.

Teo also gave her reasons for having supported the Workers' Party, an opposition political party, and for having worked as the party's election agent and polling agent in the 1984 general elections. She denied that her involvement with the Workers' Party had been influenced by Paul Lim. She also referred to a written statement which she had given to ISD on the third day of her arrest, in which she had admitted to having called for a tea gathering at her office in 1984 during which Paul Lim had suggested that the appellant and her friends help the Workers' Party. She then claimed that on reflection she was not certain if it was true that Paul Lim had made that suggestion, the admission having been made (so she alleged) after continuous suggestion that such was the case from the ISD officers in the course and at the end of what she claimed to be an oppressive interrogation. In any event, she asserted, any suggestion from Paul Lim would not have had any impact on her or her friends as they were themselves already interested in the 1984 general elections. Teo also denied having helped the Workers' Party with the intention of using it as a vehicle to further a marxist cause.

With respect to her involvement in the Law Society, Teo denied having made use of the Law Society as a political pressure group, and also denied that her activities were carried out at Paul Lim's instruction or persuasion.

In respect of de Souza the statement provided as follows:

Grounds on which a detention order is made

Between 1985 and May 1987, you acted in a manner prejudicial to the security of Singapore by being involved in a marxist conspiracy to subvert the existing social and political system in Singapore, using communist united front tactics, with a view to establishing a marxist state.

Allegations of fact

(1) That since 1985, you came under the influence of Vincent Cheng, the central figure in the marxist conspiracy, and had subsequently participated in activities to further the conspiracy.

(2) That since January 1986, you have been involved, together with Vincent Cheng, in the Coalition of Organizations for Religion and Development ('CORD'), to exert influence and control over Catholic organizations and their leaders so that they could become a political pressure group and part of a united front to subvert the existing social and political system.

In his written representations dated 18 August 1987, de Souza denied the grounds and allegations of fact against him. He admitted having known Vincent Cheng from 1985 onwards but denied any knowledge that Vincent Cheng is a marxist. He also admitted that together with Vincent Cheng, he was involved in CORD as a co-ordinator but denied exerting or intending to exert any influence and control over Catholic organizations so that they would become a political pressure group and part of a united front to subvert the existing social and political system. De Souza asserted that his involvement in CORD was motivated by the social dimension of Christianity, including aspects of liberation theology suited to the Asian context and the social teachings of the Catholic Church.

As for Wong the statement was as follows:

Grounds on which a detention order is made

Between 1983 and May 1987, you acted in a manner prejudicial to the security of Singapore by being involved in a marxist conspiracy to subvert the existing social and political system in Singapore, using communist united front tactics, with a view to establishing a marxist state.

Allegations of fact

That you, in collaboration with a few ex-activists of the Federation of United Kingdom and Eire Malaysian and Singapore Students' Organizations ('Fuemsso'), who were members of Tan Wah Piow's marxist discussion group in the United Kingdom, established the drama group Third Stage, in Singapore, in 1983, with the purpose of using it as a vehicle to subvert the existing socio-political system.

Wong did not submit any written representations to the advisory board although affidavits filed on her behalf denied her part in the marxist conspiracy.

And, in the case of Chng, the statement provided as follows:

Grounds on which a detention order is made

You acted in a manner prejudicial to the security of Singapore:

(a) by being involved, between 1975 and 1981, in the pro-communist activities of the Student Christian Movement of Singapore ('SCMS');

(b) by being involved, between 1984 and May 1987, in a marxist conspiracy to subvert the existing social and political system in Singapore, using communist united front tactics, with a view to establishing a marxist state.

Allegations of fact

(1) That you were, from 1975 till 1981, involved in the pro-communist activities of the SCMS. As a founder member of Gendang Enterprises, a cultural group formed by the SCMS, you were involved in Gendang's activities which included singing progressive songs and performing plays which exaggerated the plight of the poor and the inadequacies of the existing system.

(2) That while studying in the United Kingdom from 1981-83, you came under the influence of Tan Wah Piow. You supported Tan Wah Piow's idea of using drama as a means to reach out and radicalize the public in Singapore and on his suggestion, you joined the drama group Third Stage in 1984 following your return to Singapore.

> Since then till May 1987 you played a prominent role in making use of Third Stage as a tool to arouse disaffection among the people towards the existing socio-political system.

In her representations dated 30 July 1987, Chng denied having ever joined or been involved in the SCMS, or that Gendang Enterprise was a cultural group formed by the SCMS. She admitted that during the 1970s she was inclined towards Maoist ideas to the extent that art and culture should be 'popular' and that art should not be art for art's sake, in the sense that as many people as possible should enjoy or be able to participate in it. She also admitted having stayed with Tan Wah Piow and his wife for about eight months during her three year post-graduate degree course in UK from 1981-83, and that she had worked for about five months on Fijar magazine, a publication of Fuemsso. She admitted having discussed, among other matters, politics with Tan, but denied having come under his influence. She also expressed agreement with the idea that pressure groups could serve a useful function in a democratic political system and that in relation to drama, it could be used like a pressure group in that through drama one can bring out alternative views and criticisms. As for her joining the Third Stage, she stated that she did so upon her return from UK as she had always been interested in the arts and in drama, and denied that she used the Third Stage as a tool to arouse disaffection among the people towards the existing socio-political system.

The advisory board did not recommend the release of any of the appellants to the President and the appellants continued to be detained.

On 26 September 1987, the Minister, in exercise of the powers conferred on him by s 10 of the ISA, directed that the operation of the detention orders in respect of all the appellants should be immediately suspended, subject to the execution of a bond and three conditions restricting travel beyond Singapore and membership of societies, and prohibiting any involvement in activities propagating marxism or communism. Three other detainees were similarly released. The government, in a press release made on the same day, stated that after a careful review of the released detainees' position since their detention, it was:

> satisfied that they are unlikely to resume subversive activities and no longer pose a security threat. The suspension direction will be revoked if any of them re-involves himself/herself in subversive activities or breaches any of the conditions stipulated in the suspension direction.

On 18 April 1988, the four appellants together with five other detainees released between June and December 1987 issued a joint press statement ('joint statement'). In this joint statement, they claimed that they were issuing it not to make political capital but to clear their names in response to public statements made by or on behalf of the government regarding the reasons for their arrests and detention. They also denied the government's accusations that they were marxist conspirators, and claimed that they were compelled to appear on television and make admissions, that their statements on television were distorted and misrepresented, and that their statements given during detention were made under threats. The joint statement also stated that they had been subjected to ill-treatment, amounting in some cases to torture, during their detention.

The government responded the following day, 19 April 1988, with revocation orders made by the Minister pursuant to s 10 of the ISA, revoking the suspension directions and re-arresting eight of the signatories to the joint statement, including the appellants. The ninth signatory remained at large, having left Singapore and not returned, in breach of one of the conditions of her suspension direction. The relevant parts of the revocation orders against the four appellants state as follows:

> And whereas on 18 April 1988, the said (name of detainee) issued a joint statement, inter alia, denying any involvement in a marxist conspiracy.
>
> And whereas the Minister for Home Affairs is satisfied that in view of the statement it is necessary in the public interest that the direction dated 26 September 1987 should be revoked.
>
> Now therefore, the Minister for Home Affairs in exercise of the powers conferred on him by s 10 of the said Act hereby revokes the direction dated 26 September 1987 with effect from 19 April 1988.

In another statement issued on 20 April 1988, the government stated that the nine signatories to the joint statement had admitted the facts of their involvement in signed statements and in television interviews shortly after their arrests.

Paragraph 16 of the statement went on to state:

> The detainees now claim that everything they did was legal and legitimate. When they claim, or worse if they truly believe, that they have done nothing wrong, there is every likelihood that they will resume their former activities. The government must determine why they have repudiated their earlier statements and reversed their positions. It has therefore re-arrested the eight ex-detainees who are in Singapore. In addition, it has also arrested Patrick Seong Kwok Kei, aged 34, a lawyer, in connection with the investigations.

On 27 April 1988, Teo made a statutory declaration in which she stated her belief that all her statements regarding her involvement in, inter alia, the Law Society and the Workers' Party given after her arrest in May 1987 were accurate and fair. However, she claimed that she was not aware she was playing any role in any marxist conspiracy. She also stated in her declaration that she was a signatory to the joint statement because she resented the repeated reference to her as a marxist conspirator intent on subverting the existing government.

On 28 April 1988, the Ministry of Home Affairs issued another statement in which it was stated that investigations had established that the joint statement was a political ploy to discredit the government and that the eight ex-detainees who were re-arrested (including the appellants) had sworn statutory declarations in which they reaffirmed the truth of their original statements to ISD and in television interviews in 1987. The Ministry's statement also stated that the statutory declarations showed that the ex-detainees were not aggrieved parties seeking redress, but were protagonists seeking to discredit the government, and provoke agitation and condemnation from human rights groups and the foreign press.

A ministerial press conference was held on 29 April 1988 to elaborate on the government press statement concerning the re-arrest of the eight ex-detainees and the detention of lawyer Patrick Seong.

On 18 June 1988, Teo was served with a direction made under s 8(2) of the ISA, extending her detention for one year with effect from 20 June 1988. The remaining appellants were served with extension orders under s 8(2) when their initial one-year detention period expired some time after their applications had been dismissed by the High Court.

The applications for leave to issue writs of habeas corpus by Chng, de Souza and Wong came up for hearing before the High Court on 23 May 1988. Teo's application was argued from 27 to 30 June 1988. The High Court delivered judgment in the case of Chng, de Souza and Wong on 27 May 1988, and in Teo's case on 2 August 1988, dismissing their respective applications with costs. The appellants now appeal to this court.

The legal issues

It would be useful, we think, if we first outline the submissions in relation to the legal issues raised here and in the court below. It is common ground that in habeas corpus proceedings the burden, in the first instance, is on the detaining authority to justify the legality of the detention. The first legal issue relates to how this initial burden may be discharged. Mr Lester, counsel for Teo, submitted that the exercise of the discretionary power under ss 8 and 10 of the ISA is subject to the objective test and thus reviewable by a court of law and that to discharge its burden, the executive has to satisfy the court that there are objective facts in existence which justify the executive's decision. On the other hand, the respondents submitted that the executive's burden of justifying the detention is discharged by the mere production of the orders pursuant to which detention was carried out. The basis for this submission is the contention that the subjective test applies to the exercise of discretion under ss 8 and 10 of the ISA so that the court cannot review such exercise of discretion.

Mr Robertson, counsel for Chng, de Souza and Wong, adopted Mr Lester's submissions in this respect. Mr Robertson, however, went further and submitted that as the detention order which the Minister makes under s 8(1) of the ISA depends on the President being satisfied that it is necessary to do so for one of the purposes specified therein, the burden is on the respondents to also produce evidence of the President's satisfaction.

The second legal issue arises in relation to the revocation of a suspension direction under s 10 of the ISA. Mr Robertson contended that as s 10 of the ISA does not give any power to re-arrest and re-detain following the making of the revocation order, the re-detention of his clients was therefore unlawful.

The third legal issue was raised by Mr Lester and concerned the question whether Teo's detention, even if originally lawful, had been rendered unlawful by the conditions of her detention.

Evidence of the President's satisfaction under s 8(1) of the ISA

The question relating to the scope of review, by the court, of the exercise of discretion under ss 8 and 10 of the ISA arises only if such exercise of discretion is reviewable in the first place. However, Mr Robertson submitted that before one even considers the question of reviewability, the preliminary requirement that the President has been satisfied as required under s 8(1) must be met. This, he contended, was a condition precedent to the making of the detention order by the Minister under s 8(1) irrespective of whether the subjective or the objective test applies to the discretionary power thereunder. In this respect, he submitted, the respondents are legally obliged to produce admissible evidence before the court of the President's satisfaction.

Section 8(1) of the ISA provides that 'the Minister shall make' a detention order 'if the President is satisfied with respect to any person that, with a view to preventing that person from acting in any manner prejudicial to the security of Singapore ..., it is necessary to do so'. In our view, it is plain and it is not disputed by the respondents, that the Minister's power to make the detention order depends on the President having been satisfied in the first place. It is a significant feature of s 8(1) that two different persons are involved; the discretion whether it is necessary to detain someone for one of the specified purposes is exercisable by the President, but where he is satisfied that it is necessary to do so the actual order is made by the Minister who in so doing exercises no discretion and merely performs an administrative function. It is true that under art 21(1) of the Constitution the President acts in accordance with the device of the Cabinet or of a Minister acting under the general authority of the

Cabinet. However, that does not detract from the fact that under s 8(1) of the ISA the President's satisfaction is a condition precedent to the Minister's power to make the detention order. It seems to us clear therefore that where detention under s 8(1) is challenged the respondents must in addition to producing the detention order also produce evidence of the President's satisfaction. This is clearly so irrespective of the reviewability or otherwise of the President's satisfaction.

The next immediate issue is whether on the evidence the respondents have discharged their burden. Mr Robertson contended on behalf of Chng, de Souza and Wong that the respondents have not done so as there is no admissible evidence of the President's satisfaction. The recitals in the detention orders that the President 'is satisfied' are insufficient evidence because of the rule against hearsay; the orders are signed not by the Minister but by the Permanent Secretary. The affidavits by BG Tan, Permanent Secretary to the Minister of Home Affairs, are insufficient evidence as firstly, the affidavits merely referred to the 'government' being satisfied, and secondly, any such evidence by BG Tan constituted hearsay evidence. We were also referred to the judgment in *Lee Mau Seng* v *Minister for Home Affairs*[1] at p 146, where the applicant's argument, that there was no evidence of the President's satisfaction, failed because there was 'an affidavit by the Minister for Home Affairs of the Cabinet's satisfaction and of the President's satisfaction after receiving the advice of the Cabinet and that the said Minister then made the order of detention'.

However, the learned trial judge accepted the respondents' contention that the recitals in the detention orders regarding the subjective satisfaction of the President and the affidavit of BG Tan, read as a whole, sufficiently established that the President was satisfied, after having acted on the advice of the Cabinet. The learned judge further observed that it was 'for the applicants to allege and show that the power was exercised without the subjective satisfaction of the President' and that this 'assertion of fact must be made by or properly made on behalf of the applicants in an affidavit' which had not been done. The learned judge was also of the view that BG Tan's deposition as to the 'government' being satisfied 'meant or must be taken to mean that the President was also satisfied'. In reply to these observations, Mr Robertson submitted before us that the President's satisfaction, though formal, was nevertheless a requirement separate from the Cabinet's satisfaction and pointed out that under art 21(1) of the Constitution, the President was entitled to request 'information concerning the government which is available to the Cabinet' even though he 'shall act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet'. Counsel further noted that in any case BG Tan's depositions constituted hearsay, and, finally, that tthe issue raised was not of fact but of law. Referring to s 34 of the Interpretation Act (Cap 1, 1985 Ed) which provides that it shall be sufficient if the exercise of any power conferred on the President is signified under the hand of any Minister or of the Secretary to the Cabinet, counsel submitted that an affidavit by a Minister or the Secretary to the Cabinet stating that the President was satisfied would provide sufficient evidence.

We accept Mr Robertson's submission that the respondents are legally obliged to produce admissible evidence before the court of the President's satisfaction, and in our view, the question whether they have done so is a question of law. As such the appellants, Chng, de Souza and Wong, are entitled to raise the issue without any affidavit controverting this point. Secondly, in our judgment, evidence required must be such evidence as would be admissible at a trial. Hearsay evidence would not be sufficient. In the circumstances it is clear that there is no admissible evidence of the President's satisfaction. Neither the recitals in the detention orders nor BG Tan's affidavit evidence that the 'government' was satisfied could possibly be sufficient evidence.

Counsel for the respondents relied on the presumption omnia esse rite acta to fill in this gap in their evidence. We understand the submission to be that this presumption (that everything is presumed rightly and duly performed until the contrary is shown) applies so that it must be presumed, until the contrary is shown, that the requisite as to the satisfaction of the President under s 8(1) of the ISA was complied with. In support of this submission, counsel for the respondents referred us to Viscount Maugham's judgment in *Liversidge* v *Anderson*,[2] and to *Greene* v *Secretary of State for Home Affairs*.[3] Both cases concerned the Secretary of State's discretion under reg 18B of the Defence (General) Regulations 1939 to make a detention order against any person whom he had reasonable cause to believe to be of hostile associations. Viscount Maugham said in *Liversidge*,[2] at pp 225-226:

> I can deal much more shortly with the question whether an onus is thrown on the first respondent, the Secretary of State who made the order for detention, to give evidence to show that he had reasonable cause to believe the appellant to be a person of hostile associations ... The order on its face purports to be made under the regulation and it states that the Secretary of State had reasonable cause to believe the facts in question. In my opinion, the well-known presumption omnia esse rite acta applies to this order, and, accordingly, assuming the order to be proved or admitted, it must be taken prima facie, that is until the contrary is proved, to have been properly made and that the requisite as to the belief of the Secretary of State was complied with. It will be noted that on the view I have expressed as to the construction of the regulation it is the personal belief of the Secretary of State that is in question ... It has never, I think, been suggested in such cases that the Secretary of State or public officer must prove that he was so 'satisfied' when he made

the order. Just as the fact that the act of the Secretary of State acting in a public office is a prima facie evidence that he has been duly appointed to his office, so his compliance with the provision of the statute or the order in council under which he purported to act must be presumed unless the contrary is proved.

In our judgment, however, it would be wrong to apply the presumption to the present appeals. Admissible evidence of the President's satisfaction in the present context refers to direct as opposed to hearsay evidence of such satisfaction. In relation to reg 18B in *Liversidge*[2] and *Greene*,[3] what was required was direct evidence that the Secretary of State had reasonable cause to believe the appellants to be of hostile associations. Affidavit evidence deposed to by the Secretary of State would have sufficed. However, Viscount Maugham in the passage cited above took the view that such an affidavit was unnecessary as the presumption applied so that it could be presumed that the requisite as to the belief of the Secretary of State had been complied with.

In our view, the essential fact which permitted the presumption to be raised there was the fact that the requisite belief was that of the same person who made the detention orders. There was evidence that the Secretary of State had made the orders; it was presumed that in doing so he had complied with the statute under which he purported to act, ie that he had complied with the requisite as to his belief. In the present cases before us, the requisite s 8(1) of the ISA satisfaction is not that of the person who made the detention orders but of someone else. The orders, signed by the Permanent Secretary, show that the Minister had made those orders; however, the requisite satisfaction which precedes his power to do so is not his satisfaction but that of the President. Direct evidence of the President's satisfaction would mean affidavit evidence deposed to by the President that, acting in accordance with advice of the Cabinet or the authorized Minister as provided under art 21 of the Constitution, he was satisfied that it was necessary to detain the appellants for any of the purposes specified in s 8(1) of the ISA. In our judgment, it cannot be presumed from the mere fact that the Minister has made a detention order under s 8(1) of the ISA, that the requisite satisfaction of someone else, ie the President, has been complied with.

Mr Robertson, referring to s 34 of the Interpretation Act, submitted that evidence of the President's state of mind could be signified by either a Minister or the Secretary to the Cabinet. We do not think that is correct. Section 34 of the Interpretation Act allows any Minister or the Secretary to the Cabinet to signify the President's exercise of any power conferred on him. That section has nothing to do with establishing the state of mind of the President where, as in s 8(1) of the ISA, he is not exercising a particular power.

In our judgment, the crucial question is what evidence must exist before the President's satisfaction can be presumed, applying the presumption omnia esse rite acta. The detention order signed by the Permanent Secretary is sufficient evidence that the Minister made the order: see s 35 of the Interpretation Act. The Minister of Home Affairs must make the order where the President is satisfied it is necessary to do so for one of the purposes stated in s 8(1). In our view, the required evidence is evidence that the Cabinet or the authorized Minister was satisfied and that the President after receiving the advice of the Cabinet or the authorized Minister was satisfied. Now, who can give such evidence? In our judgment, where it was the Cabinet that was involved, such evidence must come from any Cabinet Minister or the Secretary to the Cabinet. Where a Minister acting under the general authority of the Cabinet was involved, then such evidence must come from that Minister. No Permanent Secretary can give the required evidence as described above. Once the required evidence is before the court, the court will then presume that the President was satisfied without requiring direct evidence from the President himself.

Of course, the Minister can make the detention order only after the President's satisfaction has been conveyed to him. Evidence from the Minister himself that this was so would put the matter beyond question. However, in the absence of such evidence from the Minister himself, in our view, it cannot be presumed to be so from the fact that he made the order.

The conclusion therefore appears inescapable that in the present appeals the respondents have not discharged the burden of proving the legality or validity of the detention orders. Such burden is discharged only by the production of the detention orders and evidence of the President's satisfaction either from the President himself or by way of evidence from any Cabinet Minister or the Secretary to the Cabinet (or from the authorized Minister), that the Cabinet (or the authorized Minister) was satisfied and that the President after receiving the advice of the Cabinet (or the authorized Minister) was satisfied. The appeals by Chng, de Souza and Wong must be allowed on this ground albeit a technical one, and the appellants Chng, de Souza and Wong must be discharged from custody.

With respect to Teo's appeal, we are faced with the immediate problem that this technical ground was neither raised nor relied on by her counsel. The affidavit evidence put forth on behalf of the respondents in her case is equally insufficient to discharge the respondents' initial onus of proof. Admittedly BG Tan's affidavit in her case does state that the President, acting in accordance with the advice of Cabinet, was satisfied. However, that is of course hearsay evidence and therefore in-

admissible. Further, there is nothing in Teo's affidavit which admits the existence of the President's satisfaction. In our view, on the evidence, there is no difference in this aspect between Teo's case and the other three cases.

In our judgment, the issue being one of law, the fact that this technical ground has not been raised by Teo's counsel does not bar us from making a decision based on it. We have decided what the respondents' legal burden of proof is, and the principle must apply to all the appeals. As such we have to consider whether in law the respondents' burden has been discharged. We are also mindful of the fact that counsel for the respondents have not had an opportunity to be heard on this point in Teo's appeal. However, Mr Tiwari appeared as counsel for the respondents in all the four appeals and he has therefore had the opportunity to submit on this point during the hearing of the appeals by Chng, de Souza and Wong. In our view, the respondents in Teo's case, who are also the respondents in the other three cases, will suffer no prejudice if our decision with respect to Teo relies upon this point. In all four cases, the affidavits filed on behalf of the respondents are deposed to by the Permanent Secretary. No affidavit by a Cabinet Minister or the Secretary to the cabinet has been filed. In our judgment in the special circumstances of these appeals we cannot ignore this particular issue of law in respect of Teo's appeal. Accordingly Teo's appeal is also allowed on the ground that the respondents have failed to discharge their burden of proving the President's satisfaction. She, also, must be discharged from custody.

What we have said so far is of course sufficient to dispose of all four appeals. However, the remaining issues of law raised in these appeals have been fully argued and as they are important issues of law, we would also deal with them in this judgment.

The reviewability of the exercise of discretion under ss 8 and 10 of the ISA

The question here pertains to the reviewability of the President's satisfaction under s 8 of the ISA and the Minister's satisfaction under s 10 of the ISA. Section 8 provides as follows:

> (1) If the President is satisfied with respect to any person that, with a view to preventing that person from acting in any manner prejudicial to the security of Singapore or any part thereof or to the maintenance of public order or essential services therein, it is necessary to do so, the Minister shall make an order –
>
> (a) directing that such person be detained for any period not exceeding two years; or
>
> (b) ...
>
> (2) The President may direct that the period of any order made under subsection (1) be extended for a further period or periods not exceeding two years at a time.

Section 10 of the ISA is in the following terms:

> At any time after an order has been made in respect of any person under section 8(1)(a) the Minister may direct that the operation of such order be suspended subject to the execution of a bond and to such conditions –
>
> ...
>
> as the Minister sees fit; and the Minister may revoke any such direction if he is satisfied that the person against whom the order was made has failed to observe any condition so imposed or that it is necessary in the public interest that such direction should be revoked.

The reviewability of the discretions under ss 8 and 10 of the ISA, depends on:

(a) whether the objective or the subjective test applies to the exercise of the discretions; and

(b) the effect of national security considerations on the reviewability of these discretions.

(a) *Subjective/objective test*

The respondents contended that s 8(1) contemplates the subjective satisfaction of the President and as such it follows that this satisfaction is not justiciable. In other words, according to the respondents, the exercise of discretion under s 8(1) is not open to review by the courts which therefore cannot inquire as to the grounds and the facts on which the President has expressed his satisfaction. In support of this contention, counsel for the respondents referred us to *Karam Singh* v *Menteri Hal Ehwal Dalam Negeri, Malaysia*[4] and several subsequent cases which applied it.

On the other hand, counsel for Teo (whose submissions, as we have said, were adopted by the other appellants) argued that the above proposition is no longer good law and that the court can review the exercise of the President's discretion under s 8(1) of the ISA. It was also submitted that the learned trial judge had erred in law in approving the decisions in *Karam Singh*[4] and its progeny and in reaffirming, in Teo's case, the four propositions of law which he had set out in his earlier judgment with respect to the other three appellants ('the *Kevin de Souza*[5] judgment).

The learned trial judge had held that the exercise of the President's discretion under s 8 of the ISA is not justiciable, after dealing with several cases cited by both counsel for Teo and the respondents. The learned judge also reaffirmed the four propositions in his *Kevin de Souza*[5] judgment after having reviewed once again the relevant case law. In that judgment, the learned judge had expressed his opinion that:

> ... courts of justice must, accordingly, give effect to the following propositions when engaged in reviewing cases involving national security:
>
> (1) the subjective determination of the Minister is not justiciable: see *Karam Singh* v *Menteri Hal Ehwal Dalam Negeri, Malaysia*;

(2) courts have refused to review the exercise of ministerial discretion when its validity is challenged in habeas corpus proceedings: see *Liversidge* v *Anderson* [1942] AC 206 and *Greene* v *Secretary of State for Home Affairs* [1942] AC 284;

(3) courts cannot examine or investigate the sufficiency of the matters upon which the subjective satisfaction of the Minister is or is purported to be grounded but can examine the grounds disclosed by the Minister to see and ensure that there has been no illegality, irrationality or procedural impropriety: see *Teh Cheng Poh* v *PP* [1979] 2 MLJ 50, at 55C/F per Lord Diplock and the *GCHQ* case [1985] AC 374; and

(4) subject to the foregoing, those who are responsible for national security must be the sole judge of what national security requires: see the *GCHQ* case [1985] AC 374 and *R* v *Secretary of State of Home Department, ex parte Ruddock* [1987] 2 All ER 518.

In reaffirming these propositions in Teo's case, the learned judge had said:

> Propositions 1, 2 and 4 and the first part of proposition 3 reflect, in my view, limits of judicial review under the supervisory and not the appellate jurisdiction of the courts and, in cases involving national security, they reflect the common sense approach as enunciated in the *GCHQ* case and the example of application in *Ruddock's* case. The second part of proposition 3 set out the heads of judicial review so that courts can remedy any unlawfulness in the exercise of discretionary powers ...

Before us, it was common ground between counsel for the appellants and the respondents that the second part of proposition 3 in the *Kevin de Souza*[5] judgment is inconsistent with the other propositions. Counsel for Teo urged us to approve the second part of proposition 3 and to discard the others, whilst counsel for the respondents predictably argued against the second part of proposition 3 and contended that the other propositions should be approved instead.

We would agree that prima facie the inconsistency in the four propositions seems apparent. However, we think that in view of the clarification made by the learned judge in Teo's case, what the learned judge meant by these four propositions was that although any exercise of discretion can in general be reviewed on the grounds of illegality, irrationality or procedural impropriety, nevertheless where the exercise of discretion is on national security grounds, the court would leave those responsible for national security to be the sole judges of what national security requires. Looked at in this way, the so-called inconsistency does not exist. Be that as it may, it remains for us to deal with this threshold issue of the reviewability or justiciability of the exercise of discretion under s 8 of the ISA.

Karam Singh,[4] on which the respondents rely, is a decision of the Malaysian Federal Court involving a detention under s 8 of the Malaysian ISA which is identical to s 8 of our own ISA. It was there held that the question whether there was reasonable cause to detain the appellant under s 8 was a matter of opinion and policy, a decision which could only be taken by the executive. Suffian FJ said, at p 150:

> ... when the power to issue a detention order has been made to depend on the existence of a state of mind in the detaining authority, which is a purely subjective condition, so as to exclude a judicial inquiry into the sufficiency of the grounds to justify the detention, it would be wholly inconsistent to hold that it is open to the court to examine the sufficiency of the same grounds to enable the person detained to make a representation ...

and at p 151:

> Finally, in my opinion, it is not for a court of law to pronounce on the sufficiency, relevancy or otherwise of the allegations of fact furnished to him ... Whether or not the facts on which the order of detention is to be based are sufficient or relevant, is a matter to be decided solely by the executive. In making their decision, they have complete discretion and it is not for a court of law to question the sufficiency or relevance of these allegations of fact.

It is not disputed that the subjective discretion test, applied in *Karam Singh*,[4] has since then continued to find favour with the Malaysian courts: see *Yeap Hock Seng* v *MHEDN, Malaysia*[6] and *Athappen a/l Arumugam* v *MHEDN, Malaysia*[7] (in respect of the Minister's discretion to make preventive detention orders under the Emergency (Public Order and Prevention of Crime) Ordinance 1969 if satisfied that it is necessary for the purpose of preventing the detainee from acting in any manner prejudicial to public order etc); and more recently, *Re Tan Sri Raja Khalid bin Raja Harun*,[8] *Theresa Lim Chin Chin* v *Inspector-General of Police*[9] and *Karpal Singh* v *MHEDN, Malaysia*.[10]

The subjective test has also been applied by the High Court of Singapore in respect of s 8 of the ISA: *Lee Mau Seng* v *Minister of Home Affairs, Singapore*;[1] and in Brunei: *Re Wong Mann Tung*.[11]

However, having heard the extensive arguments and in the light of the decisions cited to us of the highest courts in many Commonwealth countries and of the Judicial Committee of the Privy Council in recent years, we agree with the submission by counsel for the appellants that it is the objective test that is applicable to the review of the exercise of discretions under ss 8 and 10. In our judgment, the time has come for us to recognize that the subjective test in respect of ss 8 and 10 of the ISA can no longer be supported.

First, we accept the contention that *Karam Singh*[4] and its progeny can no longer be said to be good law in so far as the decision in *Karam Singh*[4] had applied the case of *Liversidge* v *Anderson*[2] and its companion case *Greene* v *Secretary of State for Home Affairs*.[3] The House of Lords

has, in recent years, recognized that the majority judgments in both the latter cases were wrong, preferring instead the strong dissenting judgment of Lord Atkin.

Both *Liversidge* v *Anderson*[2] and *Greene*[3] concerned the discretion of the Secretary of State under reg 18B of the Defence (General) Regulations 1939 to make a detention order against any person whom 'the Secretary of State has reasonable cause to believe ... to be of hostile origin or associations or to have been recently concerned in acts prejudicial to the public safety or the defence of the realm ...' In *Liversidge*[2] the detainee had brought an action for damages for false imprisonment and the issue arose out of his application for particulars of the grounds on which the respondent had reasonable cause to believe that (i) he was a person of hostile associations, and (ii) by reason thereof it was necessary to exercise control over him. In *Greene*[3] the application was for leave to issue a writ of habeas corpus.

The House of Lords held in both cases that the discretion under reg 18B is a matter for the executive discretion of the Secretary of State and that where the Secretary of State acting in good faith makes an order in which he recites that he has reasonable cause for his belief, a court of law cannot inquire whether in fact the Secretary of State had reasonable grounds for his belief. Thus the House construed reg 18B to mean 'if the Secretary of State *thinks he has reasonable cause* to believe ...' (emphasis added). As a result in *Liversidge*[2] it was held the court could not compel the Secretary of State to give particulars of the grounds for his belief, and in *Greene*[3] the production of the Home Secretary's order, the authenticity and good faith of which were not impugned, was held to constitute a complete answer to the application for a writ of habeas corpus.

Lord Atkin dissented from the subjective approach taken by the majority in preference for the objective approach and held that the Home Secretary had not been given an unconditional authority to detain. As his Lordship said in *Liversidge*[2] at p 245:

> After all this long discussion the question is whether the words 'if a man has' can mean 'If a man thinks he has'. I am of opinion that they cannot ...

In *Nakkuda Ali* v *Jayaratne*,[12] the Privy Council refused to adopt the subjective approach of the majority in *Liversidge*[2] in construing a regulation with the words 'where the Controller has reasonable grounds to believe ...'. *Liversidge*[2] was confined to the particular regulation before the House.

In *Ex parte Rossminster*[13] the majority decision in *Liversidge*[2] came under further attack. Lord Diplock felt, at p 1011, that:

> the time has come to acknowledge openly that the majority of this House in *Liversidge* v *Anderson* [1941] AC 206 were expediently and, at that time, perhaps, excusably, wrong and the dissenting speech of Lord Atkin was right.

Lord Scarman said, at p 1025, that:

> [the] ghost of *Liversidge* v *Anderson* [1941] AC 206 therefore casts no shadow upon this statute. And I would think it need no longer haunt the law. It was laid to rest by Lord Radcliffe in *Nakkuda Ali* v *Jayaratne* [1951] AC 66 and no one in this case has sought to revive it. It is now beyond recall.

Lord Scarman had occasion to cross paths with *Liversidge*[2] once again in *Khawaja* v *Home Secretary*,[14] where his Lordship referred to *Ex parte Rossminster*[13] and said, at p 110:

> The classic dissent of Lord Atkin in *Liversidge* v *Anderson* [1941] AC 206 ... is now accepted ... as correct not only on the point of construction of reg 18(b) of the then Emergency Regulations but in its declaration of English legal principle ...

The High Court of Singapore has recently also expressed doubt over whether the majority decisions in *Liversidge*[2] and *Greene*[3] can still stand in the light of all these cases which have accepted Lord Atkin's dissenting judgment: see *Lau Seng Poh* v *Controller of Immigration, Singapore*[15] at p 352.

Further, we note that even the recent decisions of the Malaysian Supreme Court seem to have moved away from a strict adherence to the subjective test, although it must be said the court did in each case refer to the subjective test in *Karam Singh*[4] and *Liversidge*[2] with approval. In *Re Tan Sri Raja Khalid*,[8] for example, the court was faced with habeas corpus proceedings challenging the applicant's arrest under s 73(1) of the ISA which permitted any police officer to arrest without warrant and to detain pending inquiries:

> any person in respect of whom he has reason to believe –
>
> (a) that there are grounds which would justify his detention under section 8; and
>
> (b) that he has acted or is about to act ... in any manner prejudicial to the security of Malaysia ...

The Supreme Court held that ss 73(1) and 8 of the ISA are so inextricably connected that the subjective test should be applied to both so that the court cannot require the police officer to prove to the court the sufficiency of the reason for his belief under s 73(1). Nevertheless, the court went on to hold that if facts are furnished voluntarily, as was done in that case, for the consideration of the court, it would be naive to preclude the trial judge 'from making his *own evaluation and assessment* and to come to a *reasonable conclusion*' (emphasis added). The Supreme Court then upheld the trial judge's order for the release of the applicant, being unable to disagree with the trial judge's conclusion that the evidence did not show that the applicant had acted in any manner prejudicial to the

security of the country. With respect, it seems to us that despite having said that the subjective test applied, the court in actual fact applied the objective test in evaluating and assessing the evidence 'to come to a reasonable conclusion'. If the exercise of discretion is truly subjective, then it must be irrelevant whether or not evidence is disclosed to the court, for 'of course, if the subjective theory is right and the (decision maker) has indeed unconditional power ... it is enough for him to say that he exercised the power ...' (per Lord Atkin in *Liversidge*,[2] at p 247).

In *Theresa Lim* v *IGP*,[9] the Supreme Court emphasized the fact that the court will not be in a position to review the fairness of the decision-making process by the police and the Minister under ss 73(1) and 8 of the ISA because of the lack of evidence since the Constitution and the law protect them from disclosing any facts if disclosure would in their opinion be against the public interest. The court then expressed its opinion that it is for this reason that it is more appropriately described as a subjective test, for even if the test were objective nothing much can be done in view of the lack of evidence. With respect, in our view, this approach confuses the notion of a subjective discretion (which by nature of its being subjective is unreviewable) with the question of proof in respect of an objective discretion (which would be open to review).

Finally, in *Karpal Singh*,[10] the Supreme Court relied on the distinction drawn in *Karam Singh*[4] between allegations of fact and grounds of detention in the context of s 8 of the ISA, and held that:

> whilst the grounds of detention stated in the detention order are open to challenge or judicial review if alleged to be not within the scope of the enabling legislation, the allegations of fact upon which the subjective satisfaction of the Minister was based are not.

With respect, we find this distinction illogical since the allegations of fact are as much evidence of the matters taken into consideration as the grounds of detention. If a court can hold a detention order bad because, in the court's judgment, the grounds do not fall within the scope of s 8 of the ISA, then as a matter of logic the court must also be able to hold the detention order to be bad if, in its judgment, the allegations of fact do not fall within the scope of s 8 either. In neither case can the detention order be said to be an order properly within the scope of the enabling legislation. It seems to us that this was also implicitly recognized by the Supreme Court in *Re Tan Sri Raja Khalid*[8] when it upheld the trial judge's decision that the applicant's arrest and detention was unlawful since the evidence did not support the police officer's alleged belief that what the applicant had done could lead to violent action by members of the armed forces thereby affecting the security of the nation. In any event, it is in our view a departure from the subjective theory to hold that a court can review the grounds on which the President's discretion was exercised, to determine whether such grounds are within the scope of s 8, despite the President's expressed satisfaction that detention is necessary with a view to the purposes stated in s 8 on those very grounds. In so doing, the court is really inquiring into the President's exercise of discretion quite objectively.

Secondly, we would respectfully say that we agree with judicial opinion expressed in other jurisdictions, to the effect that the court can objectively review the President's exercise of discretion in the context of preventive detention on national security grounds. Counsel for the appellants referred us to several cases, including *Minister of Home Affairs* v *Austin*,[16] *Katofa* v *Administrator-General for SW Africa*[17] and *Attorney General of St Christopher, Nevis & Anguilla* v *Reynolds*.[18] We agree with the decisions in these cases in so far as they have rejected the subjective test.

In *Austin*,[16] s 17(1) of the Emergency Powers (Maintenance of Law and Order) Regulations 1983 permitted the making of a detention order 'if it appears to the Minister that it is expedient in the interests of public safety or public order' to do so. The Supreme Court of Zimbabwe held that judicial review was not excluded and that though subjective language had been used, the Minister had to consider objective facts and the court could determine whether he had acted reasonably in doing so.

In *Katofa*,[17] s 2(1) of the Proc AG 26 of 1978 provided that:

> If the Administrator-General is satisfied:
>
> (a) that the peaceful ... development of SW Africa is ... threatened by violence against or intimidation of ... any particular person ... or persons generally; and
>
> (b) that any person committed ..., or in any manner promotes ... the commission of such violence or intimidation,
>
> he may issue a warrant for the arrest and detention of such person.

It was held that objective reasonable grounds had to exist to cause the Administrator-General to be satisfied; the mere ipse dixit of the Administrator-General was insufficient as the court would not be able to judge therefrom whether his reasons 'in law justify the detention'.

In *Reynolds*,[18] the plaintiff was detained by the Governor of the State of St Christopher, Nevis and Anguilla under a detention order which recited that the Governor was 'satisfied' with respect to the plaintiff that he had recently been concerned in acts prejudicial to the public safety and public order, and that by reason thereof it was necessary to exercise control over him. The order was made under reg 3(1) of the Emergency Powers Regulations 1967, which reads:

> Detention of Persons. (1) *If the Governor is satisfied that any person has recently been concerned in acts prejudicial to the public safety*, or to public order or in the preparation or instigation of such acts, or in impeding the maintenance of supplies and services essential to the life of the community *and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained* (emphasis added).

Section 15 of the Constitution of St Christopher, Nevis and Anguilla provided safeguards similar to art 151(3) of our Constitution and s 16 was in turn similar to art 9(2). Section 35 of that Constitution also required a two-thirds majority of the votes of elected members of the House of Assembly to alter any of the provisions of the Constitution.

The Privy Council held, inter alia, that reg 3(1) of the Emergency Powers Regulations should be construed in conformity with the Constitution and that the words 'if the Governor is satisfied' in reg 3(1) should be construed to mean if the Governor is satisfied on reasonable grounds. Lord Salmon in delivering the judgment of the Board said, at p 656:

> Their Lordships consider that it is impossible that a regulation made on 30 May 1967 under an order in council which, on its true construction, conformed with the Constitution on that date, could be properly construed as conferring dictatorial powers on the Governor: and that is what the regulation would purport to do if the words 'if the Governor is satisfied' mean 'if the Governor thinks that etc' ...

Lord Salmon also referred to the decisions in *Secretary of State for Education and Science* v *Tameside Metropolitan Borough Council*[19] and *Nakkuda Ali* v *Jayaratne*[12] as examples where subjective words were construed not to give an absolute discretion and said, at p 659:

> The facts and background of the *Tameside* case [1977] AC 1014, *Liversidge* v *Anderson* [1941] AC 206, the *Nakkuda Ali* case [1951] AC 66 and the present case are, of course, all very different from each other. This is why their Lordships have reached their conclusion as to the true construction of reg 3(1) of the Emergency Powers Regulations 1967 in reliance chiefly on the light shed by the Constitution, rather than on such light as may be thrown on that regulation by the authorities to which reference has been made.

It seems to us that the underlying basis of the decision in *Reynolds*[18] was the Privy Council's view that the Constitution of St Christopher, Nevis and Anguilla could not have intended to authorize the legislature to make any law which allows arbitrary detention. As Lord Salmon said, at p 655:

> It is inconceivable that a law which gave absolute power to arrest and detain without reasonable justification would be tolerated by a Constitution such as the present, one of the principal purposes of which is to protect fundamental rights and freedoms.

Thirdly, counsel for the appellants had argued that s 8 should be interpreted to provide for an objective test, on constitutional grounds. The argument proceeds by stages. Sections 8 and 10 of the ISA are exceptions to the fundamental rights guaranteed by arts 9, 13 and 14 of the Constitution and should therefore be narrowly construed so as to derogate as little as possible from such fundamental rights: *Liew Sai Wah* v *PP*[20] and *Ong Ah Chuan* v *PP*.[21] The concept of 'law' in arts 9 and 12(1) includes both the common law principles of natural justice and fairness (*Ong Ah Chuan* v *PP*[21]) and also the right contained in s 3 of the Habeas Corpus Act 1816 which right is also contained in art 9(2). Thus the legislative powers of Parliament must not be exercised in a manner which authorizes or requires the exercise of arbitrary power, or the exercise of power in breach of fundamental rules of natural justice: *Ong Ah Chuan*.[21] Article 149(1) protects the validity of ss 8 and 10 against any inconsistency with art 9, 13 or 14, but not against inconsistency with art 12(1). Further, under art 93 judicial power is vested exclusively in the Supreme Court and Subordinate Courts of Singapore. Therefore, ss 8 and 10 of the ISA would be consistent with arts 12 and 93 of the Constitution, and consequently valid, only if the powers which they confer do not authorize arbitrary powers of detention, and only if the courts can review the exercise of these powers. Applying the subjective test to the exercise of discretion under ss 8 and 10 of the ISA would mean giving the executive arbitrary powers of detention, thereby rendering such powers unconstitutional and void. Counsel referred also to *A-G of St Christopher, Nevis & Anguilla* v *Reynolds*,[18] *Teh Cheng Poh* v *PP*[22] and to *Liyanage* v *The Queen*.[23]

In *Ong Ah Chuan*,[21] the appellant had been convicted on a charge of trafficking in controlled drugs and sentenced to death. The death sentence was mandatory under the Misuse of Drugs Act as the amount of drugs involved exceeded 15 gm. Before the Privy Council, counsel for the appellant mounted an eleventh hour attack on the constitutional validity of the presumption in s 15 of the Act (presumption that possession of more than two gm of heroin is for the purpose of trafficking) and of the mandatory death sentence. Their Lordships first adopted, with respect to Part IV of the Constitution ('fundamental liberties'), a 'generous interpretation avoiding ... the austerity of tabulated legalism, suitable to give individuals the full measure of the (fundamental liberties) referred to'. Accordingly, their Lordships rejected the respondent's contention that the requirements of arts 9 and 12 of the Constitution are satisfied if the deprivation of life or liberty complained of has been carried out in accordance with provisions contained in any Act passed by Parliament however arbitrary or contrary to fundamental rules of natural justice the provisions of such Act may be, so long as these provisions are of general application to all citizens of Singapore so as to avoid falling foul of the anti-discriminatory provisions of

art 12(1). In their Lordships' view, the expression 'law' refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution, and which did not flout these fundamental rules.

With respect to the mandatory death sentence in cases of trafficking in more than 15 gm of drugs, the Privy Council held that there was no inconsistency with art 12(1). The factor which the legislature adopted as constituting the dissimilarity in circumstances (ie the quantity of the drug) was held not purely arbitrary but which bore a reasonable relation to the social object of the law.

In the present case, the submission by counsel for Teo is that applying *Ong Ah Chuan*,[21] if the discretion in ss 8 and 10 of the ISA is subjective, that would allow arbitrary detention which would result in inconsistency with art 12(1). We accept this argument. We would also note, however, that the provisions in ss 8 and 10 are not arbitrary in themselves for they provide for the exercise of the power to detain only for specific purposes which, to use Lord Diplock's words in *Ong Ah Chuan*,[21] bear a reasonable relation to the object of the law. Nevertheless, if the discretion is not subject to review by a court of law, then, in our judgment, that discretion would be in actual fact as arbitrary as if the provisions themselves do not restrict the discretion to any purpose and to suggest otherwise would in our view be naive.

Fourthly, support for the view that the objective test is applicable can be found in the Privy Council decision in *Teh Cheng Poh* v *PP*.[22]

In *Teh Cheng Poh*,[22] the Privy Council had to consider the discretionary power to proclaim an area as a security area under s 47 of the Malaysian Internal Security Act (which is in pari materia with s 48 of our ISA). That provision provided that 'if in the opinion of the Yang di-Pertuan Agong public security in any area ... is seriously threatened ... he may, if he considers it to be necessary ... proclaim such area a security area ...'. Lord Diplock, delivering the judgment of the court, said of this discretion, at p 472:

> The power to proclaim an area as a security area with the consequences that this will entail is a discretionary one. It is for the Yang di-Pertuan Agong (again, in effect, the Cabinet) to form an opinion whether public security in any area of Malaysia is seriously disturbed or threatened by the causes referred to in the section, and to consider whether in his opinion it is necessary for the purpose of suppressing organized violence of the kind described. *But, as with all discretions conferred upon the executive by Act of Parliament, this does not exclude the jurisdiction of the court to inquire whether the purported exercise of the discretion was nevertheless ultra vires either because it was done in bad faith (which is not in question in the instant appeal) or because as a result of misconstruing the provision of the Act by which the discretion was conferred upon him the Yang di-Pertuan Agong has purported to exercise the discretion when the conditions precedent to its exercise were not fulfilled, or in exercising it, he has taken into consideration some matter which the Act forbids him to take into consideration or has failed to take into consideration some matter which the Act requires him to take into consideration.* (emphasis added)

And, in respect of the Yang di-Pertuan Agong's discretion to revoke a security area proclamation, Lord Diplock said, at p 473:

> Section 47(2) expressly provides that a security area proclamation 'shall remain in force until it is revoked by the Yang di-Pertuan Agong or is annulled by resolutions passed by both Houses of Parliament: ... *The revocation of a security area proclamation is, like its issue, a matter that is left by the section to the discretion of the Yang di-Pertuan Agong acting in accordance with the advice of the Cabinet. In their Lordships' view, however, the discretion whether and when to revoke a security area proclamation is not entirely unfettered.* The proclamation is lawful because it is considered by the Yang di-Pertuan Agong to be necessary to make an area a security area for the purpose, not of suppressing violence by individuals generally but of suppressing existing or threatened organized violence of the kind described in the section. *Once he no longer considers it necessary for that particular purpose it would be an abuse of his discretion to fail to exercise his power of revocation, and to maintain the proclamation in force for some different purpose.* (emphasis added)

There is one other reason for rejecting the subjective test. In our view, the notion of a subjective or unfettered discretion is contrary to the rule of law. All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power. If therefore the executive in exercising its discretion under an Act of Parliament has exceeded the four corners within which Parliament has decided it can exercise its discretion, such an exercise of discretion would be ultra vires the Act and a court of law must be able to hold it to be so. In *Padfield* v *MAFF*,[24] s 19(3) of the Agricultural Marketing Act 1958 merely provided for a committee of investigation to consider and report on any complaint made to the Minister 'if the Minister in any case so directs'; nothing was expressed as to the nature or extent of the Minister's discretion. Even then, the House of Lords held that the Minister's discretion was not unfettered and could not be exercised such as to frustrate the policy of the Act. Lord Reid expressly rejected the 'unreasonable proposition that it must be all or nothing – either no discretion at all or an unfettered discretion'. It must be clear therefore that the boundaries of the decision-maker's jurisdiction as conferred by an Act of Parliament is a question solely for the courts to decide. There is also, as counsel for the appellant has pointed out, no ouster clause in respect of s 8 or 10 of the ISA. Adopting the objective test in respect of ss 8 and 10 of the ISA would also be consistent with arts 9(2) and 93 of

the Constitution. Further, it is, in our view, no answer to refer to accountability to Parliament as an alternative safeguard. As Lord Diplock put it in *R* v *IRC, ex parte National Federation of Self-Employed and Small Businesses Ltd*[25] at p 644:

> It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge ...

(b) *National security considerations*

Counsel for the respondents had also argued that as the subject matter in ss 8 and 10 of the ISA relates to matters of national security the court is precluded from reviewing the exercising of such discretion since matters of national security should be left to those responsible for it.

The role that assertions of national security has to play in the review of administrative actions should be looked at in its proper perspective. On the objective test, an exercise of discretion would be reviewable; nevertheless a court may still be precluded from reviewing that exercise of discretion on the ground that the decision was made on considerations of national security.

It is clear that where a decision is based on considerations of national security, judicial review of that decision would be precluded. In such cases, the decision would be based on a consideration of what national security requires, and the authorities are unanimous in holding that what national security *requires* is to be left solely to those who are responsible for national security: *The Zamora*[26] and *GCHQ* case.[27] However, in these cases, it has to be shown to the court that considerations of national security were involved. Those responsible for national security are the sole judges of what action is necessary in the interests of national security, but that does not preclude the judicial function of determining whether the decision was in fact based on grounds of national security.

In the *GCHQ* case[27] itself, the Minister had issued an instruction varying the terms and conditions of service of the staff at GCHQ with the effect that they would no longer be permitted to belong to national trade unions. There was no consultation with the trade unions or the staff prior to the issuing of that instruction. National security was raised as the reason for the decision not to have prior consultation. The House of Lords first found that the applicants would, apart from considerations of national security, have had a legitimate expectation to be consulted and that therefore the decision-making process would have been unfair by reason of the Minister's failure to consult and would have been amenable to judicial review. However, the House of Lords then went on to hold that the evidence established that the Minister had shown that her decision had in fact been based on considerations of national security that outweighed the applicant's legitimate expectation of prior consultation, and that it was for the executive and not the courts to decide whether in any particular case the requirements of national security outweighed those of fairness.

Lord Fraser explained in his judgment, at p 402:

> The question is one of evidence. The decision on whether the requirements of national security outweigh the duty of fairness in any particular case is for the government and not for the courts; the government alone has access to the necessary information, and in any event the judicial process is unsuitable for reaching decisions on national security. *But if the decision is successfully challenged, on the ground that it has been reached by a process which is unfair, then the government is under an obligation to produce evidence that the decision was in fact based on grounds of national security.* Authority for both points is found in *The Zamora* [1916] 2 AC 77. The former point is dealt with in the well-known passage from the advice of the Judicial Committee delivered by Lord Parker of Waddington, at p 107:
>
> 'Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public.'
>
> The second point, less often referred to, appears at p 106 and more particularly at p 108 where this passage occurs:
>
> 'In their Lordships' opinion the order appealed from was wrong, not because, as contended by the appellants, there is by international law no right at all to requisition ships or goods in the custody of the court, but because the judge had before him no satisfactory evidence that such a right was exercisable.' (emphasis added)

In the same case, Lord Roskill said, at p 420:

> ... The courts have long shown themselves sensitive to the assertion by the executive that considerations of national security must preclude judicial investigation of a particular grievance. *But even in that field the courts will not act on a mere assertion that questions of national security were involved. Evidence is required that the decision under challenge was in fact founded on those grounds.* (emphasis added)

(See, also, per Lord Scarman at p 406G-H; per Lord Diplock at p 412F; and per Lord Brightman at p 423.)

With respect to s 8 of the ISA, what must be noted first is the fact that the nature of the discretion therein itself involves national security. Where a decision is made that it is 'necessary' to detain someone 'with a view to preventing that person from acting in any manner prejudicial to the security of Singapore', it is plain that the decision to detain would be one based on considerations of national security. Whether, on grounds properly falling within the scope of s 8, the detention order is necessary is therefore, really, a question as to what national

security requires and therefore would be a matter solely for the executive's judgment. However, just as the court can determine that a decision was in fact based on national security considerations, equally the court can in our view determine whether the matters relied on by the executive in the exercise of discretion can be said to fall within the scope of s 8 of the ISA. In our opinion, the conclusion that the exercise of discretion under s 8 is reviewable on our interpretation of s 8 of the ISA is also consistent with the case law relating to review of decisions claimed to have been made based on considerations of national security.

In relation to what we have said regarding the effect of assertions of national security, it is to be noted that one of the grounds of appeal in Teo's case is that the learned trial judge had erred in his analysis of the decision in *R* v *Secretary of State for the Home Department, ex parte Ruddock*.[28] In that case, it was alleged that the Home Secretary's warrant authorizing the interception of one of the applicants' telephone calls had not been issued in accordance with published criteria for the interception of communications. The Home Secretary asserted that no warrants had been issued which did not meet the published criteria, but refused for security reasons to either confirm or deny that such a warrant had been issued in that case. In effect therefore, national security was raised as a plea in bar to preclude the court from considering the application challenging the Home Secretary's decision at all. The learned trial judge stated in his judgment in Teo's case that in *Ruddock*,[28] 'Taylor J did not look behind the (Home Secretary's) assertions and accepted these assertions as a sufficient answer against the complaint of an abuse of power'. The impression given in this statement is that Taylor J accepted the national security assertions as a plea in bar. In our view that would be a wrong reading of the case. As Taylor J explained in that case, in those cases, including *The Zamora*[26] and the *GCHQ* case,[27] where national security has been pleaded it has been as a plea in defence of an admitted act or decision and such a plea would succeed if there is evidence that the challenged decision was in fact founded on national security grounds. It is only in such cases that national security considerations would preclude judicial investigation of the challenged decision. The phrase that national security considerations must preclude judicial investigation of particular grievances was not intended to apply as a plea in bar (see pp 1489-1490). Taylor J clearly disagreed with the Home Secretary's contention, either as a general proposition or in that particular case, that the court should abdicate its judicial function where national security is raised as, in effect, a plea in bar. As he said, at p 1491, he did 'not accept that the court should never inquire into a complaint against a minister if he says his policy is to maintain silence in the interests of national security'.

Karam Singh[4] *– a binding precedent?*

Counsel for the respondents raised before us the question of whether the decision in *Karam Singh*[4] is binding on this court, but did not seriously argue that it is.

Karam Singh[4] was decided on 25 April 1969 by the Federal Court of Malaysia on an appeal from the High Court of Malaysia. Singapore was by then a fully independent republic, having left the Federation of Malaysia on 9 August 1965. However, the Singapore Supreme Court of Judicature Act 1969 which established the present Court of Appeal did not come into operation until 9 January 1970. During this period from 9 August 1965 to 9 January 1970, appeals from the High Court of Singapore continued to lie to the Federal Court of Malaysia and from there on to the Privy Council: see s 11 of the Republic of Singapore Independence Act. The issue here is whether the Federal Court of Malaysia remained part of the judicial system of Singapore when hearing appeals arising from a *Malaysian High Court* during this period, bearing in mind the independent status of Singapore and s 13(1) of the Republic of Singapore Independence Act. Section 13(1) provided for the continuance of existing laws with such modifications as may be necessary to bring them into conformity with the independent status of Singapore. This issue has not to our knowledge been decided by any court in Singapore but it would appear from the express provisions of s 11 that the Federal Court of Malaysia was part of the judicial system of Singapore during this period and remained so irrespective of whether it was hearing an appeal arising from a Malaysian High Court or a Singapore High Court. It would seem well nigh impossible to construe s 11 as creating a distinct and separate Federal Court of Malaysia hearing only appeals from the High Court of Singapore.

Having said that we would add that this issue does not arise for our decision as counsel for Teo has chosen to proceed on the basis that the Federal Court which decided *Karam Singh*[4] was part of the judicial system of Singapore. We must therefore point out that what we have stated above is in no way to be taken as a decision of this court and was stated without the benefit of full argument from the Bar. This intriguing issue shall have to be left to be decided if and when it does arise in future.

Counsel for Teo submitted that *Karam Singh*[4] is in any event not binding on this court, relying on the exceptions in *Young* v *Bristol Aeroplane Co Ltd*.[29]

First, he submitted, *Karam Singh*[4] is not binding on this court as it is inconsistent and cannot stand with the decisions of the Privy Council in *Teh Cheng Poh*[22] and *Ong Ah Chuan*.[21] *Teh Cheng Poh*[22] has already been dealt with earlier.

As for *Ong Ah Chuan's* case,[21] counsel submitted that the subjective test in *Karam Singh*[4] is inconsistent

with the Privy Council's interpretation of arts 9 and 12 of the Constitution, which would prohibit the kind of arbitrary power of detention that may result from the decision in *Karam Singh.*[4] *Ong Ah Chuan*[21] has already been dealt with earlier.

Counsel also submitted that in the light of *Ong Ah Chuan,*[21] the decision in *Karam Singh*[4] can be considered as having been made per incuriam as the constitutional points advanced before us were not raised in *Karam Singh.*[4]

We agree that for the above reasons, *Karam Singh*[4] cannot be considered to be still binding on us with respect to the question whether the discretions under ss 8 and 10 of the ISA are subjective (and hence unreviewable) or objective (and hence reviewable). We have therefore decided not to follow the decision in *Karam Singh.*[4]

Scope of review

Counsel for the appellants contended that the learned trial judge had erred in not following the House of Lord's decision in *Khawaja* v *Home Secretary.*[14]

In *Khawaja,*[14] the appellant challenged the decision of the immigration authorities that he was an illegal entrant under the Immigration Act 1971 and authorizing his detention under para 16(2) of Schedule 2 to the Act. Paragraphs 8-11 of that Schedule dealt with the 'removal of persons refused leave to enter and illegal immigrations'. Paragraph 8 itself empowered the immigration officer to give directions for removal 'where a person arriving in the United Kingdom is refused leave to enter'. The vital provisions of Schedule 2 in that case were as follows:

> 9 Where an illegal entrant is not given leave to enter or remain in the United Kingdom, *an immigration officer may give any such directions* in respect of him as in a case within paragraph 8 above are authorized by paragraph 8(1).
>
> 16(2) A person in respect of whom directions may be given under any of paragraphs 8 to 14 above *may be detained under the authority of an immigration officer* pending the giving of directions and pending his removal in pursuance of any directions given. (emphasis added)

The House of Lords, departing from its previous view expressed in *Ex parte Zamir,*[30] held that on an application for judicial review of an immigration officer's order detaining any person in the UK as an illegal entrant it was the court's duty to inquire whether there had been sufficient evidence to justify the immigration officer's belief that the entry had been illegal and that the duty of the court was not limited to inquiring merely whether there was some evidence on which the immigration officer had been entitled to decide as he had. The House further held that in such a case, it was for the executive to prove to the satisfaction of the court on a balance of probabilities the facts relied on by the immigration officer as justifying his conclusion that the appellant was an illegal entrant.

In the instant cases, the contention of counsel for the appellants is, as we understand it, that upon a judicial review, the President's satisfaction under s 8(1) (ie that it is necessary to detain the appellants with a view to preventing them from acting in any manner prejudicial to the security of Singapore) is subject to establishing an objective jurisdictional fact (ie that the appellants were likely to act or to continue acting in a manner prejudicial to the security of Singapore). Therefore, relying on *Khawaja,*[14] counsel submitted that the court's duty was not limited to inquiring merely whether there was evidence on which the President had been entitled to decide that he was satisfied as required by s 8(1), but that the court must also examine the evidence and make its own decision whether in fact the evidence is sufficient to justify the President's satisfaction that the jurisdictional fact had been made out. Further, it was submitted, again relying on *Khawaja,*[14] that it was for the executive to prove the existence of the jurisdictional fact on a balance of probabilities.

We are unable to agree with this submission by counsel for the appellants. The decision in *Khawaja*[14] that the burden of proof lay on the authorities to prove to the court's own satisfaction that the appellant was an 'illegal entrant' was clearly based on the fact that the House of Lords viewed the 'illegal entrant' requirement as a jurisdictional fact to the authorities' power to detain and remove the appellant.

The House of Lords recognized that the function of the court in judicial review depends on whether a jurisdictional or precedent fact is involved. Where no jurisdictional issue arises the scope of review is limited to *Wednesbury* principles; where, however, a jurisdictional fact issue arises the scope of review extends to deciding whether the evidence justifies the decision. It is also clear from the judgments in *Khawaja*[14] that whether a particular discretionary power is subject to any jurisdictional or precedent fact depends on the construction of the legislation which creates that power. A discretionary power may be required to be exercised based on objective facts but Parliament may decide to entrust all relevant decisions of these facts as well as the application to the facts of the relevant rules and any necessary exercise of discretion to the decision-maker, in which case the scope of review would be limited to *Wednesbury* principles. So long as Parliament makes its intention clear, the scope of review would be so limited, even where the liberty of the subject is concerned.

Lord Fraser formulated the question in respect of the function of the courts as follows, at p 97 D-F:

> The second general issue relates to the function of the courts and of this House in its judicial capacity when dealing with

applications for judicial review in cases of this sort; is their function limited to deciding whether there was evidence on which the immigration officer or other appropriate officer in the Home Office could reasonably come to his decision (provided he acted fairly and not in breach of rules of natural justice), or does it extend to deciding whether the decision was justified and in accordance with the evidence? On this question I agree with my noble and learned friends, Lord Bridge and Lord Scarman, that an immigration officer is only entitled to order the detention and removal of a person who has entered the country by virtue of an ex facie valid permission if the person is an illegal entrant. That is a 'precedent fact' which has to be established. It is not enough that the immigration officer reasonably believes him to be an illegal entrant if the evidence does not justify his belief. Accordingly, the duty of the court must go beyond inquiring only whether he had reasonable grounds for his belief ...

Lord Scarman referred to judicial review being limited 'to the *Wednesbury* principle' where the decision under review is 'outside the 'precedent fact' category of provision' (at p 109), whereas it is a 'well-established principle that, where the exercise of an executive power depends upon the precedent establishment of an objective fact, it is for the court, if there be a challenge by way of judicial review, to decide whether the precedent requirement has been established' (at p 108). This latter principle was also described by his Lordship as the 'precedent fact' principle of review. Lord Scarman also dealt with the decision in *Zamir*[30] in which the House of Lords had also been faced with the same para 9 of Schedule 2 to the Immigration Act, in the following terms, at pp 108-109:

The gloss which the House in *Zamir's* case [1980] AC 930 put upon the words of para 9 was to read them as meaning not 'where a person is an illegal entrant' but 'where the immigration officer has reasonable grounds for believing a person to be an illegal entrant' he may be removed if not given leave to enter. If it be sought to justify the gloss as a proper construction of the statutory language, there is a difficulty. The gloss requires the introduction into the paragraph of words that are not there. Must they, then, be implied? This question lies at the heart of the problem.

...

In rejecting the appellant's argument based on the 'precedent fact' principle of review Lord Wilberforce said in *Ex parte Zamir* [1980] AC 930, 948:

'My Lords, for the reasons I have given I am of opinion that the whole scheme of the Act is against this argument. It is true that it does not, in relation to the decisions in question, use such words as 'in the opinion of the Secretary of State' or 'the Secretary of State must be satisfied' but it is not necessary for such a formula to be used in order to take the case out of the 'precedent fact' category. The nature and process of decision conferred upon immigration officers by existing legislation is incompatible with any requirement for the establishment of precedent objective facts whose existence the courts may verify.'

He therefore implied into para 9 the words needed to bring it outside the 'precedent fact' category of the provision ... The *Zamir* decision [1980] AC 930 would limit judicial review, where the executive has decided to remove someone from the country as being an illegal entrant, to 'the *Wednesbury* principle'.

This principle is undoubtedly correct in cases where it is appropriate. But, as I understand the law, it cannot extend to interference with liberty *unless Parliament has unequivocably enacted that it should* ... (emphasis added)

And at p 110, Lord Scarman had this to say:

Section 3 (Habeas Corpus Act 1816) is the beginning of the modern jurisprudence the effect of which is to displace, *unless Parliament by plain words otherwise provides*, the *Wednesbury* principle in cases where liberty is infringed by an act of the executive. (emphasis added)

Lord Scarman then went on to conclude that he found it 'impossible to imply into the statute words the effect of which would be to take the provision, para 9 of Schedule 2 to the Act, out of the 'precedent fact' category ... If Parliament intends to exclude effective judicial review of the exercise of a power in restraint of liberty, it must make its meaning crystal clear.'

At p 122, Lord Bridge observed that where a 'decision ... is fairly and squarely committed to the (decision-maker) by the statute (this) *necessarily entrusts all relevant decisions of fact, as well as the application to the facts of the relevant rules and any necessary exercise of discretion, to the (decision-maker)*'. (emphasis added)

It is clear from the above that the House of Lords found that Parliament had not clearly expressed an intention to exclude review of the discretion under para 9 from the precedent fact principle of review. It is in our view also clear that had the words sought to be implied been expressly enacted in para 9, the precedent fact principle of review would have been excluded.

In respect of s 8(1) of the ISA, the question, to use Lord Fraser's formulation, is whether the court's function is limited to deciding whether there was evidence on which the President could reasonably come to his decision that he was satisfied that it was necessary to detain the appellants with a view to preventing them from acting in any manner prejudicial to the security of Singapore, or whether the court's function extends to deciding whether the decision was justified and in accordance with the evidence. Similarly in respect of s 10 of the ISA the question is whether there was evidence on which the Minister could reasonably come to his decision that it was necessary in the public interest to revoke the suspension order, or whether the court's function extends to deciding whether the decision was justified and in accordance with the evidence. If either decision depends on a jurisdictional or precedent fact being established, the duty of the court must go beyond inquiring only whether there were reasonable grounds for that decision.

The important question therefore is whether the discretion of the President under s 8(1) or of the Minister under s 10 depends on the establishment of an objective jurisdictional or precedent fact thereby falling within the 'precedent fact category' and subject to the 'prece-

dent fact principle of review'. This would entail a construction of the relevant provisions to see if Parliament has expressed an intention in plain and unequivocal words to take these discretions out of the precedent fact category and exclude the precedent fact principle of review. It is, in the final analysis, the construction of the relevant provisions that determines the precise function of the court when reviewing decisions made under these provisions.

In our judgment, the discretions under ss 8 and 10 of the ISA fall outside the 'precedent fact category'. There is no need to imply any words as was done in *Zamir*[30] and disagreed with in *Khawaja*.[14] Section 8(1) expressly states, in plain and unequivocal terms, that it is for the President to be satisfied that detention is necessary with a view to preventing the detainee from acting in any manner prejudicial to national security. In other words, the decision whether on such evidence as is available the detainee, if not detained, was likely to act or to continue acting in any manner prejudicial to national security, has by the express terms of s 8(1) been entrusted to the President. Similarly, the decision whether on such evidence as is available a revocation order under s 10 is necessary in the public interest has by the express terms of s 10 been entrusted to the Minister.

Apart from the construction of the words used, we do not think it could have been intended by Parliament that whether or not on the evidence the detainee is likely to act or to continue acting in a manner prejudicial to the security of Singapore, should fall to be objectively determined, as a fact, by a court of law. It hardly needs any emphasis that the judicial process is unsuitable for reaching decisions on national security.

In the circumstances, it is in our judgment clear that the scope of review of the exercise of discretion under ss 8 and 10 of the ISA is limited to the normal judicial review principles of 'illegality, irrationality or procedural impropriety' (*CCSU* v *Minister for the Civil Service*[27] also known as the *GCHQ* case). We would also observe that by 'irrationality', Lord Diplock in the *GCHQ* case[27] meant 'what can by now be succintly referred to as *Wednesbury* unreasonableness (*Associated Provincial Picture Houses Ltd* v *Wednesbury Corporation*[31])'. Lord Diplock had there described an 'irrational decision' as one so 'outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it'.

We should add that counsel for the appellants had also referred us to s 3 of the Habeas Corpus Act which states that '... it shall be lawful for the justice ... before whom (a writ of habeas corpus) may be returnable, to proceed to examine into the truth of the facts set forth in such return ...' and to its application in *Khawaja*.[14] The history and effect of the Habeas Corpus Act 1816 has been stated by Lord Scarman in that case (at p 110). At common law, where the respondent's return to the writ was valid on its face, that was the end of the matter and the court could take the case no further. The Habeas Corpus Act 1816 extended the scope of the process by conferring upon the judges the power in non-criminal cases to inquire into the truth of the facts contained in the return. It should be noted that the section 'contemplates the *possibility* of an investigation by the court so that it may satisfy itself where the truth lies' (per Lord Scarman, at p 110). In *Khawaja*[14] the House of Lords held that the court could inquire into *and decide for itself the truth of the fact* that the applicant was an 'illegal entrant'. As Lord Scarman pointed out, s 3 of the Act empowered them to do so. However, it must be noted that the extent of the inquiry that the court was said to have been empowered to carry out, in *Khawaja*,[14] was on the basis that there a jurisdictional fact was involved. *As Lord Scarman also said, at p 110: 'There is here a principle which the judges ... have accepted as justly met by the rule ... that where the exercise of executive power depends upon the precedent establishment of an objective fact, the courts will decide whether the requirement has been satisfied.'* (emphasis added). Where no jurisdictional fact is involved, s 3 of the 1816 Act in our view empowers the court to inquire into the facts but only to the extent of determining whether there was evidence on which the authority could reasonably have acted. It is thus clear that s 3 of the Habeas Corpus Act 1816 does no more than empower the court to review the detention order beyond what is stated on the face of the return, something it could not have done at common law. Whether this review extends to the determination of the actual truth of the grounds on which the order was made, or whether it extends only to an inquiry on *GCHQ* depends on whether the issue involves a jurisdictional fact.

Counsel for Teo had also raised the 'principle of proportionality' as a ground for judicial review. Suffice it for us to say that this principle has not been established as a separate ground of review. In our view, the dicta in the English cases cited to us show that it can be subsumed under 'irrationality'. If a decision on the evidence is so disproportionate as to breach this principle, then in our view, such a decision could be said to be irrational in that no reasonable authority could have come to such a decision. Indeed, in *R* v *Secretary of State for Home Department, ex parte Benwell*,[32] Hodgson J referred to a decision 'so disproportionate ... as to be perverse'. In addition, counsel had argued that the detention would be illegal if the detainee is being punished for no wrong, citing *Wheeler* v *Leicester Council*[33] and *R* v *Ealing LBC, ex parte Times Newspapers Ltd*.[34] It must, however, be borne in mind that, as counsel has himself stated, these cases are simply examples of 'irrationality'. In *Wheeler*[33]

the City Council banned the local rugby football club from using its recreational ground for 12 months because the club had refused to support the council's anti-apartheid policy to the extent and in the manner that the council had wanted them to. The House of Lords quashed the council's decision on the ground that it was a misuse of the council's statutory powers to punish the club when the club had done no wrong. In our view the case merely shows that as the club's conduct was not a 'wrong' (ie no misconduct in the context of the council's discretionary power) the decision to ban the club for that conduct was irrational or was made for an impropoer purpose or based on an irrelevant consideration. The determining factor is of course whether the relevant conduct can be said to be wrong, and therefore a relevant consideration, in the context of the relevant discretionary power.

Burden of proof

Counsel for the appellants urged upon us that the burden of proof is on the detaining authority to justify the detention, including proving to the court the jurisdictional facts which it has been contended are required under ss 8 and 10 of the ISA. The latter point has already been dealt with; we have decided that there are no jurisdictional facts involved in respect of the satisfaction of the President or the Minister in either s 8 or s 10 of the ISA.

Counsel for the appellants continued to rely on *Khawaja*[14] as authority for the submission that the burden of proof is on the detaining authority. As we have stated, the burden of proof is in the first instance on the detaining authority to justify the detention. The principle cannot be disputed. It has been applied in all the cases. In our opinion, this burden of proof is discharged by evidence that the President, acting in accordance with advice of the Cabinet or the authorized Minister, is satisfied, and the production of the detention order. The President's satisfaction precedes and therefore amounts to a jurisdictional fact to the Minister's power to make the order. The respondents must therefore prove the President's satisfaction. However, there is no jurisdictional fact to the President's satisfaction which is thus reviewable only on *GCHQ* grounds. In our judgment, where the appellants challenge the President's satisfaction on these grounds, the burden of proof is on them.

The reason for the distinction is, to our minds, clear. Where an issue as to jurisdictional fact arises, the burden must be on the executive to prove the existence of the fact for that fact precedes the existence of the discretion, in this case the power to direct that the appellants be detained. The challenge in effect pertains to the existence of the discretion. Where, however, no issue as to jurisdictional fact arises, there is no doubt as to the existence of the discretionary power; what is challenged is the exercise of the discretion and the normal principle must apply, ie that it is for those who allege that the exercise of discretion is wrong to prove it to be so.

As for the onus of proof as stated in *Karam Singh*,[4] that would no longer be applicable in view of our decision rejecting the subjective test and adopting instead, the objective test in respect of the exercise of the discretion in ss 8 and 10 of the ISA.

By way of summary, where the detaining authority has discharged the initial burden of proof, the burden then falls on the detainee to prove that his detention cannot be sustained on *GCHQ* grounds. If the detainee adduces evidence which is prima facie sufficient for this purpose and there is no evidence to the contrary, then the detainee would have discharged his burden.

In these appeals, we find it unnecessary to consider whether the appellants or any of them have discharged the burden of proving that the exercise of the discretion by the President under s 8 and/or by the Minister under s 10 is invalid on *GCHQ* grounds; the reason is, as we have held, that the respondents have not discharged the initial burden, which is on them, to prove the President's satisfaction. Hence, the burden has not been shifted to the appellants in each case.

Power of re-detention under s 10 of the ISA

This ground of appeal was raised by counsel for Chng, de Souza and Wong. It has not been raised by counsel for Teo. The provisions of s 10 of the ISA have been set out earlier on in this judgment. It empowers the Minister to issue suspension directions and to revoke any such direction if he is satisfied that a condition imposed by the suspension direction has been breached or that it is necessary in the public interest to do so.

Mr Robertson argued that although s 10 gave the Minister power to revoke a suspension direction, it did not empower him to re-arrest and re-detain the appellants, Chng, de Souza and Wong, upon the revocation of their suspension directions. Counsel argued, relying on *Liew Sai Wah*[20] and *Magor & St Mellons* v *Newport Corporation*,[35] that in view of the nature of detention under the ISA its provisions should be construed strictly in favour of the liberty of the subject and that the court could not imply a power of arrest and detention into s 10 when Parliament had not provided for it.

By way of comparison, Mr Robertson referred to s 10 of the Malaysian Internal Security Act which contains the following additional provisions:

> ... and in any such case the revocation of the suspension shall be sufficient authority to any police officer to re-arrest without warrant the person against whom the detention order was made, and that person shall as soon as practicable be returned to his former place of detention or, if the Minister so directs, sent to another place of detention.

Counsel also referred to s 15(3) of the Indian National Security Act 1980. Section 15(1) of that Act permits the temporary release of any person detained in pursuance of a detention order and for the cancellation of his release. Section 15(3) provides that any person released under sub-s (1) 'shall surrender himself at the time and place, and to the authority, specified in the order directing his release or cancelling his release, as the case may be'. It was thus submitted that under s 15(3) the mechanism for re-detention following a cancellation of the temporary release is provided for and that no such mechanism appears in s 10 of the ISA.

Finally, counsel referred to s 74(1) of the ISA which empowers a police officer to arrest and detain without warrant, pending inquiries, any person whom he has reason to believe (a) that there are grounds which would justify his detention under s 8 and (b) that he has acted or is about to act or is likely to act in any manner prejudicial to the security of Singapore. In his submission s 74(1) provided the power to arrest and detain in respect of a s 8 order; however, it does not apply to any re-detention under s 10 since s 74(1) expressly refers to s 8, and the 'public interest' ground in s 10 is in any event wider than the scope covered by s 8(1).

In our judgment the learned trial judge was clearly correct in holding that a suspension direction merely renders the detention order inoperative for the time being and that upon its revocation, the detention order becomes operative again thereby authorizing the re-detention. A suspension direction under s 10 merely suspends the *'operation'* of the detention order. More importantly, the power to arrest and detain a person in respect of whom a s 8(1) order has been made is not pursuant to s 74(1) but by virtue of the detention order itself. The detention order is addressed to the Director of Prisons and the Commissioner of Police and all other police officers, and directs that the person named be detained. The authority to arrest and detain is obvious from the order. Section 74(1) clearly refers to the arrest and detention that *may* take place pending the making of a s 8(1) order. Therefore when a suspension direction is revoked, the order of detention springs back to life, and with it, the power to arrest and detain. There is simply no necessity for an express provision to empower the police to re-arrest and re-detain following a revocation order under s 10; the detention order itself empowers the police to do so. In our view therefore, counsel's submission in this respect is manifestly unsupportable.

Conditions of detention

Mr Lester, counsel for Teo, submitted that the nature and conditions of the appellant's detention rendered her detention unlawful. It was submitted before us that as a principle of law, a prima facie lawful detention can become unlawful if the nature or conditions of the detention fall below a minimum standard of treatment. In support of this proposition, counsel referred to *Middleweek* v *Chief Constable of Merseyside*,[36] in which Ackner LJ had said that:

> It must be possible to conceive of hypothetical cases in which the conditions of detention are so intolerable as to render the detention unlawful and thereby provide a remedy to the prisoner in damages for false imprisonment. A person lawfully detained in a prison cell would, in our judgment, cease to be so lawfully detained if the conditions in that cell were such as to be seriously prejudicial to his health ...

We would note that in *Re Al-Afifi's Application for Habeas Corpus*,[37] a decision of Rougier J given on 28 August 1987, the above statement from *Middleweek*[36] was explained as requiring something very extreme in the way of inhuman conditions to be shown; we agree with this view of *Middleweek*.[36] Once the detention is pursuant to a lawful order, it ought not to be rendered unlawful by the manner in which it is conducted save for the extreme case. In the normal case, the challenge should be against the manner in which the detention is conducted itself and not against the lawfulness of the detention.

Counsel for Teo further submitted that the appellant had a right, under the English Bill of Rights 1688 and under the guarantee of equal protection in art 12(1) of the Constitution as interpreted in *Ong Ah Chuan*,[21] not to be inflicted with cruel and unusual treatment or punishment.

Thirdly, counsel submitted that s 8(5) of the ISA empowers the Minister to make rules for the maintenance and management of any place of detention and for the discipline of detainees, but not to provide for punitive detention.

In our judgment, as a general principle, where any unlawfulness in conditions of detention is alleged, what should be challenged is the legality of the conditions themselves rather than the legality of the detention.

Summary of conclusions

We would summarize our conclusions on the legal issues raised as follows:

(1) where detention under s 8 of the ISA is challenged, the initial burden is on the executive to justify the legality of the detention; this burden is discharged by the production of the detention order and evidence that the President, acting in accordance with the advice of the Cabinet or the authorized Minister, was satisfied as required by s 8(1) of the ISA;

(2) it is for the executive to prove that the President is satisfied as under s 8(1) of the ISA the President's satisfaction precedes the Minister's powers to make the detention order;

(3) evidence of the President's satisfaction must be such evidence as would be admissible at a trial; neither the recital in the detention order nor an affidavit by the Permanent Secretary, Ministry of Home Affairs, is sufficient;

(4) in the absence of direct evidence from the President of his satisfaction, the court would presume that the President has been satisfied, where there is evidence that the Cabinet or the authorized Minister was satisfied and that the President after receiving the advice of the Cabinet or the authorized Minister was satisfied; such evidence must come from any Cabinet Minister or the Secretary to the Cabinet where it was the Cabinet that was involved, and from the authorized Minister if it was the authorized Minister who was involved;

(5) in the present appeals, the respondents have not discharged their burden of proving that the President was satisfied as required by s 8(1) of the ISA before the Minister made the detention orders. These appeals must therefore be allowed on this ground;

(6) the President's satisfaction under s 8 of the ISA and the Minister's satisfaction under s 10 of the ISA are both reviewable by a court of law as:

(a) the subjective test adopted in *Karam Singh*[4] and its progency can no longer be supported and the objective test is applicable upon a judicial review of the exercise of these discretions; and

(b) although a court will not question the executive's decision as to what national security requires, the court can examine whether the executive's decision was in fact based on national security considerations; similarly, although the court will not question *whether detention was necessary* for the purpose specified in s 8(1), the courts can examine whether the matters relied on by the executive fall within the scope of those specified purposes;

(7) the scope of review of the discretions under ss 8(1) and 10 of the ISA, however, depends on whether these discretions fall within the 'precedent fact category' so that the 'precedent fact principle of review' is applicable;

(8) where the 'precedent fact principle of review' applies, the court's function is first to determine whether the precedent fact has been established by the decision-maker to exist on a balance of probabilities and secondly, where such fact is established, to review the decision that is challenged on *GCHQ* grounds;

(9) whether the discretions fall within the 'precedent fact category' depend on a construction of the relevant provisions, the question being whether Parliament has made clear its intention to take the discretions out of the precedent fact category;

(10) it is clear that the discretions under ss 8(1) and 10 of the ISA have been entrusted to the executive thereby taking these discretions out of the precedent fact category; there are no jurisdictional or precedent facts which precede these discretions;

(11) in the circumstances the scope of review of these discretions is limited to the *GCHQ* grounds of illegality, irrationality or procedural impropriety;

(12) the burden of proving that the President's or the Minister's satisfaction is illegal, irrational or procedurally improper lies on the applicant who challenges such satisfaction on these grounds;

(13) the principle of proportionality has not been established as a separate ground for review in addition to those mentioned in (11) above;

(14) a suspension direction under s 10 of the ISA merely suspends the operation of the detention order. Once the suspension direction is revoked, the detention order becomes operative again. The power to arrest and detain is conferred by the detention order itself. No express provision is required;

(15) as a general rule therefore, where the manner in which detention is conducted is alleged to be unlawful whether because the conditions are alleged to be punitive in nature or excessively harsh, the detainee's remedy is to challenge the validity of the conditions of the detention, not the lawfulness of the detention itself.

In the final result, for the reason stated earlier, these appeals are allowed with costs here and below. We direct that orders be drawn up for the appellants' discharge from custody. For the purposes of costs, the proceedings in respect of Civil Appeal Nos 63, 64 and 65 of 1988 are to be treated as if they have been consolidated with such costs as are payable thereunder to be shared among the three appellants equally.

Appeals allowed.

Solicitors: *Teo, Lai & Lee; Wee Tay & Lim; Rajan Nair; SK Chua & Peter Low.*

Reported by *Prof Ahmad Ibrahim*